Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

_____ Term, 1995

CLARENCE L. HEDGES, THROUGH PATRICIA HEDGES BECKETT HIS PERSONAL REPRESENTATIVE , AND AFTON J. IZEN,
Petitioners

v.

RESOLUTION TRUST CORPORATION, AS RECEIVER FOR GIBRALTAR SAVINGS, F.A., SUCCESSOR-IN-INTEREST TO CATHEDRAL MORTGAGE COMPANY, INC., A CALIFORNIA CORPORATION.
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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QUESTIONS PRESENTED FOR REVIEW

QUESTION ONE

Was the elderly, incompetent, bedridden Debtor, Hedges, deprived of his constitutional right to due process in the denial of the opportunity to have assistance of counsel in a contested bankruptcy matter pursuant to the Fifth and Fourteenth Amendments to the U. S. Constitution?

QUESTION TWO

Was the application of the rules under which sanctions were imposed on Debtor, Hedges', counsel by the U. S. District Court for the District of Arizona (Phoenix), sitting as a bankruptcy appellate court, unconstitutional pursuant to the Fifth, Eighth and Fourteenth Amendments to the U. S. Constitution, since counsel was not allowed a pre-sanction hearing before imposition of sanctions, when the grounds for such sanctions were not supported on the face of the record, and when there was no supporting finding of recklessness or bad faith?

QUESTION THREE

Was it erroneous for the U. S. Court of Appeals for the Ninth Circuit to affirm the decision of the U. S. District Court for the District of Arizona (Phoenix) imposing sanctions under Fed. R. App. P. 38, when it found that the District Court did not have authority to impose sanctions under Rule 38, while sitting as a bankruptcy appellate court?

QUESTION FOUR

Were the sanctions imposed on Hedges' counsel by the U.S. District Court an "excessive fine or penalty" pursuant to the Eighth Amendment to the U.S. Constitution?

QUESTION FIVE

Are the rules sanctioning attorneys unconstitutionally vague and overbroad and arbitrarily applied in such a manner as to constitute an unconstitutional "chill" on the availability of effective assistance of counsel and zealous advocacy pursuant to the First, Fifth, Eighth and Fourteenth Amendments to the U. S. Constitution?

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IN THE

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_____ Term, 1995

CLARENCE L. HEDGES, THROUGH PATRICIA HEDGES BECKETT HIS PERSONAL REPRESENTATIVE , AND AFTON J. IZEN,
Petitioners

v.

RESOLUTION TRUST CORPORATION, AS RECEIVER FOR GIBRALTAR SAVINGS, F.A., SUCCESSOR-IN-INTEREST TO CATHEDRAL MORTGAGE COMPANY, INC., A CALIFORNIA CORPORATION.
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES, AND TO THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Petitioners, Clarence L. Hedges, Debtor/Deceased by Patricia Hedges Beckett, Personal Representative for Clarence Lee Hedges, and Attorney, Afton Jane Izen, file this Petition for Writ of Certiorari requesting that this Honorable Court review the Judgement of the United States Court of Appeals for the Ninth

Circuit affirming the Judgement of the United States District Court for the District of Arizona (Phoenix). The District Court, sitting as a bankruptcy appellate court, affirmed the Judgement of the Honorable Robert G. Mooreman, Judge of the Bankruptcy Court for the District of Arizona (Phoenix) which held that 11 U.S.C. § 524 did not apply to Cathedral Mortgage Corporation's eviction and action its attempt to collect post-petition rents allegedly owing. The District Court also granted sanctions against Debtor's counsel. The U. S. Court of Appeals for the Ninth Circuit affirmed the decision of the District Court.

OPINIONS BELOW

A copy of the decision of the U. S. Court of Appeals for the Ninth Circuit affirming the District Court's decision is attached as Appendix A. A copy of the Mandate of the U. S. Court of Appeals for the Ninth Circuit is attached as Appendix B. A copy of the Order of the U. S. Court of Appeals for the Ninth Circuit ordering that the Petition for Rehearing is filed and denied is attached as Appendix C. A copy of the February 16, 1993 Judgement of the U. S. District Court for the District of Arizona (Phoenix) is attached as Appendix D. A copy of the December 1, 1992 Order imposing sanctions is attached as Appendix E. A copy of the September 29, 1992 Order of the U. S. District Court for the District of Arizona (Phoenix) is attached as Appendix F. A copy of the September 29, 1992 Judgement in a Civil Case of the U. S. District Court for the District of Arizona (Phoenix) is attached as Appendix G. A copy of the Civil Minutes-General dated May 14, 1991 of the U. S. District Court for the District of Arizona (Phoenix) is attached as Appendix H. A copy of the May 23, 1990 Order of the U. S. Bankruptcy Court for the District of Arizona (Phoenix), including Attachment (1), Minutes filed May 16, 1990, and Attachment (2), Discharge of Debtor filed August 25, 1989, are attached as Appendix I.

JURISDICTION

This is a civil appeal from a United States Court of Appeals. The Petition for Rehearing of the Petitioners herein to the United States Court of Appeals for the Ninth Circuit was denied on October 11, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The United States Court of Appeals for the Ninth Circuit affirmed the decision of the District Court based on 11 U.S.C. § 524. It affirmed the sanctions Judgement. It found that the District Court, sitting as a bankruptcy appellate court, was not authorized to impose sanctions under Rule 38, Fed. R. App. P. , but could under Bankruptcy Rule 9011. Rule 6 of the Fed. R. Civ. P., concerning continuances, is also involved. The Bankruptcy Court denied Debtor, Hedges, a continuance, and in effect, unconstitutionally deprived an incompetent of the right to assistance of counsel to protect his right to due process.

SUMMARY OF THE CASE

The Due Process issue involved in this case is not whether an elderly incapacitated person has a right to free appointed counsel. The issue is whether an elderly incapacitated person has a right to assistance of counsel prior to eviction from his home. Doesn't the United States Constitution guarantee the rights of the nations elderly physically and mentally incapacitated citizens to due process of the law? Do the Courts have an independent duty to protect the rights of elderly physically and mentally incapacitated citizens irrespective of procedural concerns? Hedges did not claim that he had a right to appointed (free) counsel, as in a criminal case, but that he had a constitutional right to assistance of counsel, which would mean, in this case, being given sufficient time within which to retain counsel and sufficient time for his

retained counsel to become familiar with the facts of the case, so that counsel could effectively represent him.

Debtor was 90 years old, incompetent, bedridden, being fed by tubes, and without counsel, at the time that Cathedral filed its Motion to Determine Inapplicability of 11 U.S.C. § 524. His bankruptcy had originally been filed pro se. Hedges was receiving Veteran's benefits. His daughter, Patricia Beckett, had to account to the Veteran's Administration for disbursement from Hedges benefits, and could not expend any funds to retain counsel until she was appointed permanent guardian of Hedges and conservator of his estate. An examination of the record will show that Patricia Beckett was told by Judge Klobucher, at the hearing held on March 15, 1990, to obtain a guardianship of her father before she could represent him. The Arizona State Court appointed her guardian/conservator of her father with full rights and powers to make disbursements from his V.A. benefits on May 24, 1990. Nevertheless, on May 16, 1990, Judge Mooreman rendered his decision in favor of Cathedral without Debtor having been given an opportunity to respond to Appellee's pleadings. At that hearing, Beckett requested a continuance to be allowed the opportunity to respond to the Motion to Determine Inapplicability. Debtor was therefore deprived of his due process right to assistance of counsel and his right to due process under the Fifth and Fourteenth Amendments to the U. S. Constitution.

On May 21, 1990, Afton Jane Izen, who agreed to represent Hedges on a pro bono basis because of his lack of funds and inability to obtain counsel, filed a Motion for Leave to Respond to the Motion for Determination of Inapplicability of 11 U.S.C. § 524, a Response and a Motion to Reconsider opinion. On May 23, 1990, Debtor's Motion for Reconsideration and Motion to Respond were denied.

The Judgement of the bankruptcy court was appealed for Hedges. Hedges passed away on January 25, 1991. On April 5, 1991, Cathedral made a Motion to Dismiss the Appeal. On May 14, 1991, Judge Stephen M. McNamee issued a Minute Entry holding that "The Motion to Dismiss the appeal is denied. The estate of the deceased Debtor has been substituted as a party in interest; consequently, the issues on appeal are still viable, particularly those of due process and rent payments allegedly owed by the Debtor."

On September 29, 1992, the District Court affirmed the decision of the bankruptcy court. It found that Debtor, Hedges, had no right to counsel in the bankruptcy proceeding and that the Court properly found that 11 U.S.C. § 524 did not prevent Cathedral from seeking to evict Debtor or to collect post-petition rents allegedly owed by Debtor. Pursuant to Rule 38, Federal Rules of Appellate Procedure, the District Court also imposed sanctions in the amount of $24,207.09 against Debtor's counsel requiring her to pay Cathedral's, by then, the Resolution Trust Corporation's, attorney's fees and costs in this appeal. The District Court arbitrarily ruled that the appeal was frivolous, notwithstanding the May 14, 1991, Minute Entry holding that "..... the issues on appeal are still viable, particularly those of due process and rent payments allegedly owed by the Debtor." Cathedral filed an affidavit of fees and costs. Hedges' counsel filed an Objection to the affidavit, making specific objections to each entry. Cathedral was not only erroneously granted excessive fees for work done on the appeal, but also for work done in the bankruptcy court, work done on the hearings in the bankruptcy court for the Stay pending appeal and state court work for which Afton Jane Izen was not even the attorney.

On October 28, 1992, the decision of the District Court was appealed to the U. S. Court of Appeals for the Ninth Circuit. Debtor argued that his right to counsel and to due process had been violated under the Fifth and Fourteenth Amendments to the

U.S.Constitution; that there was no evidence before the bankruptcy court on which it could base its decision that Debtor is, or ever was, liable for any debt or rent on the subject property; that Appellee's claim is subject to the "Discharge Injunction" under 11 U.S.C. § 524; that Appellee, Cathedral, does not have an unavoided valid lien against Appellant/Debtor; and that the appeal was not frivolous, and contained merit, and therefore, the lower court was in error to grant sanctions against Appellant's attorney, Afton Jane Izen. On February 11, 1994, oral argument was held in San Francisco, California. The Court affirmed the decision of the District Court. Although it affirmed the District Court's decision, it found that the District Court was not authorized to impose sanctions under Rule 38, Fed. R. App. Proc., and that the District Court did not find that counsel appealed the case recklessly or in bad faith.

Petitioners filed a Motion for Rehearing in the U. S. Court of Appeals for the Ninth Circuit. On October 11, 1994, the Motion for Rehearing was denied.

STATEMENT OF THE CASE

QUESTION ONE

WAS THE ELDERLY, INCOMPETENT, BEDRIDDEN DEBTOR, HEDGES, DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO DUE PROCESS IN THE DENIAL OF THE OPPORTUNITY TO HAVE ASSISTANCE OF COUNSEL IN A CONTESTED BANKRUPTCY MATTER PURSUANT TO THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U. S. CONSTITUTION?

The Constitution of the United States guarantees all citizens the right to procedural due process and an opportunity to be heard in a fair trial pursuant to the Fifth and Fourteenth Amendments. The right to present a full defense on the issues is part of a

litigant's rights of procedural due process. *Western Electric Co., Inc. v. Stern,* 544 F. 2d 1196, 1199 (3rd Cir. 1976). The significant aspect of procedural due process is that, before a judgement is entered, the party against whom a claim is made is entitled to an opportunity to raise any defenses that the party has to the claim. Often, in the eyes of an opponent, the party has no defense to a claim, when, in fact, he has defenses that the opponent either never considered or has suppressed. For this reason, procedural due process requires that, before action is taken, both sides are accorded an opportunity to be heard. *In re Bell, Bell v. Philadelphia Housing Authority,* 97 B.R. 208, 215-18 (Bankr. E.D. Pa. 1989). Procedural due process guarantees apply to those liberty and property interests encompassed by the Fifth and Fourteenth Amendments. *Board of Regents v. Roth,* 408 U. S. 564, 569, 92 S. Ct. 2701, 2705, 33 L. Ed. 2d 548 (1972). The interest herein is a property interest.

A two-step analysis is used in order to resolve procedural due process issues. The Court must initially determine whether a protected property or liberty interest exists, and secondly, it must determine what procedures are required to protect that interest. Hedges was entitled to a full evidentiary hearing, and full processes of the Court, while having access to effective assistance of counsel.

The Bankruptcy Court did not give Debtor adequate opportunity to retain counsel or to present evidence supporting his position. Debtor was elderly, incapacitated, and unable to represent himself, and the Court had an obligation to protect his right to effective assistance of counsel and his right to due process under the circumstances. There is no way that the Debtor could have had an opportunity to present his position under any reading of the facts of this case. This Court should find that Hedges was denied due process of law.

QUESTION TWO

WAS THE APPLICATION OF THE RULES UNDER WHICH SANCTIONS WERE IMPOSED ON DEBTOR, HEDGES', COUNSEL BY THE U. S. DISTRICT COURT FOR THE DISTRICT OF ARIZONA (PHOENIX), SITTING AS A BANKRUPTCY APPELLATE COURT, UNCONSTITUTIONAL PURSUANT TO THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE U. S. CONSTITUTION, SINCE COUNSEL WAS NOT GIVEN A PRE-SANCTION HEARING BEFORE IMPOSITION OF SANCTIONS, WHEN THE GROUNDS FOR SUCH SANCTIONS WERE NOT SUPPORTED ON THE FACE OF THE RECORD, AND WHEN THERE WAS NO SUPPORTING FINDING OF RECKLESSNESS OR BAD FAITH?

Sanctions in the amount of $24,207.09 were imposed against Debtor's counsel. Although she filed an objection to the Affidavit of Attorney's Fees and Expenses filed by Cathedral, the objection was ignored, and Judgment for sanctions was entered without affording counsel a pre-sanction hearing. The only grounds given was a conclusion that she had filed a frivolous appeal. This conclusion is not supported by the record. At the outset of the appeal, shortly after Debtor had passed away, counsel for Cathedral filed a Motion to Dismiss the appeal. Judge McNamee entered a Minute Entry dated May 13, 1991, wherein he ruled that the Motion to Dismiss the appeal was denied, and reasoned that there were viable issues on appeal of due process and rents allegedly due and owing. (Appendix H)

A pleading that contains non-frivolous claims cannot be sanctioned as frivolous. *Townsend v. Holman Consulting Corporation,* 881 F.2d. 789, (9th. Cir. 1989). Sanctions must be predicated upon a finding that a pleading is objectively frivolous when it was filed, not whether it is later found to be lacking in evidentiary foundation. *Cunningham v. City of Los Angeles,* 859

F.2d. 705, 714, (9th. Cir. 1988), or that it ultimately fails on the merits. *Hudson v. Moore Business Forms, Inc.*, 836 F.2d. 1159 (9th. Cir. 1987). The mere fact that a claim does not prevail, or that a Court ultimately determines that a lawyer's view of the law is wrong, is insufficient to warrant sanctions. *Hudson*, 836 F.2d. at 1159; *Rachel v. Banana Republic, Inc.*, 831 F.2d. 1508, (9th. Cir. 1988); *Zaldivar v. City of Los Angeles*, 780 F.2d. 830 (9th. Cir. 1986). The sanction rules were never intended to punish attorneys simply because they do not prevail on their claims, nor should its overzealous application prevent them from raising innovative claims, even if they eventually fail. So long as a pleading is not lodged for an improper purpose, and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, it cannot serve as the basis for sanctions. *Golden Eagle v. Burroughs Corp.*, 801 F.2d. 1539-40 (9th. Cir. 1986).

The Ninth Circuit's decision does not address whether there was any merit to the issue on appeal, and completely ignores the fact that at the outset of the appeal, Judge McNamee ruled that there were viable issues on appeal. The issue of due process was argued on appeal, but the issue of whether there were rents due is an issue that would have required an evidentiary hearing at the Bankruptcy Court level, which was not allowed. The issues on appeal were not found to be frivolous at the time of the filing of the appeal, and therefore, should not have been found to be lacking at a later date, because the District Court ultimately ruled against them. The pleadings were not lodged for an improper purpose, and the legal argument of deprivation of constitutional due process rights in this case, was warranted by existing law and/or was a good faith argument for the extension, modification and/or reversal of existing law. Appellant's counsel did massive research of case law before filing the appeal. The purpose for filing the appeal was to attempt to get a reversal of the summary decision of the Bankruptcy Court, and to have the case remanded to the Bankruptcy Court for an evidentiary hearing. No improper

purpose can be construed from a reading of the record on appeal. The standard for appraising the actions of a signing attorney is one of objective reasonableness under the circumstances. *Greenberg v. Sala*, 822 F.2d. 882, 885 (9th. Cir. 1987); *Zaldivar*, 780 F.2d. 829. Further, the key question in assessing frivolousness is whether a complaint states an arguable claim, not whether the pleader is correct in his perception of the law. *Id.* at 830, 832.

According to the Supreme Court case of *Chambers v. Nasco*, 111 S. Ct. 2141, (1991), the prevailing party must generally bear his own attorney's fees, and cannot have them assessed against the loser. *Alyesk Pipeline Service Co. v. Wilderness Society*, 421 U. S. 240, 247, 95 S. Ct. 1612, 1616, 44 L. Ed. 2d. 141 (1975). Further, as a means of preventing erosion or evasion of the American Rule, the United States Supreme Court has held that fee-shifting as a sanction, can only be imposed for litigation conduct characterized by bad faith. See *Roadway Express, Inc. v. Piper*, 447 U. S. 752, 766, 100 S. Ct. 2455, 2464, 65 L. Ed. 488 (1980). If the District Court wishes to shift attorney's fees as a sanction, it must make a finding of bad faith in order to circumvent the American Rule. No such finding was made in this case.

The Fifth Amendment to the U. S. Constitution guarantees that Debtor's counsel will not be deprived of property without due process of law. To impose sanctions on her without a pre-sanction hearing wherein she is found guilty of bad faith or recklessness is a taking of property without due process of law. She is also guaranteed equal protection of the laws pursuant to the Fourteenth Amendment to the U. S. Constitution. The Federal Rules of Procedure under which Debtor's counsel was sanctioned were unconstitutional as applied in this case.

QUESTION THREE

WAS IT ERRONEOUS FOR THE U. S. COURT OF APPEALS FOR THE NINTH CIRCUIT TO AFFIRM THE DECISION OF THE U. S. DISTRICT COURT FOR THE DISTRICT OF ARIZONA (PHOENIX) IMPOSING SANCTIONS UNDER FED. R. APP. P. 38, WHEN IT FOUND THAT THE DISTRICT COURT DID NOT HAVE AUTHORITY TO IMPOSE SANCTIONS UNDER RULE 38, WHILE SITTING AS A BANKRUPTCY APPELLATE COURT?

The U. S. Court of Appeals for the Ninth Circuit held that the U. S. District Court for the District of Arizona (Phoenix), sitting as a bankruptcy appellate court, did not have authority to impose sanctions on Debtor's counsel pursuant to Fed. R. App. P. 38, as it did. It found that it had authority to impose sanctions under Bankruptcy Rule 9011, which it did not. Further, the Ninth Circuit found that the District Court did not make a finding of bad faith or recklessness. The Ninth Circuit, therefore, was in error in affirming the District Court's order imposing sanctions against Debtor's counsel.

QUESTION FOUR

WERE THE SANCTIONS IMPOSED ON HEDGES' COUNSEL BY THE U. S. DISTRICT COURT FOR THE DISTRICT OF ARIZONA (PHOENIX) AN "EXCESSIVE FINE OR PENALTY" PURSUANT TO THE EIGHTH AMENDMENT TO THE U. S. CONSTITUTION?

If this Court does not find that the District Court erred in granting sanctions in this case, then the focus turns to the issue of whether the sanctions imposed were an "excessive fine" pursuant to the Eighth Amendment to the U. S. Constitution. Although the District Court had the full record, including Appellee's Verified Statement of Attorney's Fees and Costs, as well as Appellant's

Objection thereto, which set out specific objections to the statement, the Ninth Circuit did not address the issue of excessiveness. The District Court order directed Cathedral to file an Affidavit of Attorneys fees for the work done on the appeal. Cathedral proceeded to file an Affidavit which included work done in the bankruptcy court, work done in the bankruptcy court for the Stay pending appeal and work done in the State Court, for which Debtor's counsel was not even the attorney.

Debtor's counsel was criticized for requesting three short extensions in the case. Judge McNamee apparently found good cause for granting the extensions, at the time, or he would not have granted them. Two of the extensions were ten day extensions in order to respond to Appellee's miscellaneous motions. Debtor's counsel is a Texas attorney, and the extensions were required, because by the time she received the motions in Texas, it was already the response deadline. A short extension was required so that counsel could prepare a response and mail it to the Court. The third extension was a request for a thirty day extension in order to prepare and file the Opening Brief. During this period, Debtor's counsel was also overseeing the care of her 72 year old mother, her 78 year old Aunt and her 89 year old Godmother. The District Court found at the time of the granting of the motions for extension of time that they were for good cause, and not filed for improper purposes, otherwise the extensions would have been denied.

The remaining criticism of Debtor's counsel is that she was required to file a Supplemental Opening and Reply Brief, because she failed to properly insert the excerpt of records. It was an embarrassing, but purely unintentional error, which was corrected by Debtor's counsel. In the same Minute Entry wherein Judge McNamee found that there were viable issues on appeal, he granted Debtor's counsel twenty days within which to file Supplemental Opening and Reply Briefs to include appropriate references to the record.

There is no basis in the record for the District Court to shift Appellee's attorney's fees and costs to Debtor's counsel and it was error for it to do so.

QUESTION FIVE

ARE THE RULES SANCTIONING ATTORNEYS UNCONSTITUTIONALLY VAGUE AND OVERBROAD AND ARBITRARILY APPLIED IN SUCH A MANNER AS TO CONSTITUTE AN UNCONSTITUTIONAL "CHILL" ON THE AVAILABILITY OF EFFECTIVE ASSISTANCE OF COUNSEL AND ZEALOUS ADVOCACY PURSUANT TO THE FIRST, FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE U. S. CONSTITUTION?

The federal courts have issued conflicting opinions on the standard to be applied in determining whether or not a prevailing defendant is entitled to attorney's fees. The rules are so vague and overbroad, and so arbitrarly applied, as to violate the due process clause of the Fifth Amendment and the equal protection clause of the Fourteenth Amendment to the U. S. Constitution. Attorneys are expected to vigorously and zealously represent their clients, but the rules that they have to operate under are not clear. Many attorneys are improperly sanctioned for purely political reasons. The rules that have been promulgated are so unclear as to "chill" advocacy. Most ordinary Americans, who already find it difficult, if not impossible, to find representation, will find it even more difficult in the future. The vague, overbroad and arbitrarily applied rules concerning imposition of santions on attorneys is unconstitutional and will adversely affect the public.

REASONS FOR ALLOWANCE OF THE WRIT

1. Hedges, an elderly, incompetent, bedridden Debtor, was deprived of his constitutional due process right to be allowed

sufficient time to retain counsel in order to have effective assistance of counsel in a contested bankruptcy matter pursuant to the Fifth and Fourteenth Amendments to the U. S. Constitution.

2. The application of the rules under which sanctions were imposed on Debtor's counsel by the District Court, sitting as a bankruptcy appellate court, was unconstitutional pursuant to the Fifth, Eighth and Fourteenth Amendments to the U. S. Constitution, because sanctions were imposed without a pre-sanction hearing, the sanctions were not supported on the face of the record, and there was no supporting finding of bad faith.

3. The Ninth Circuit erroneously affirmed the decision of the District Court imposing sanctions under Fed. R. App. P. 38.

4. The sanctions imposed on Hedges' counsel were an "excessive fine and penalty" pursuant to the Eighth Amendment to the U. S. Constitution.

5. The rules sanctioning attorneys are unconstitutionally vague and overbroad and are arbitrarily applied in such a manner as to constitute an unconstitutional "chill" on the availability of effective assistance of counsel and zealous advocacy pursuant to the First, Fifth, Eighth and Fourteenth Amendments to the U. S. Constitution.

CONCLUSION

For the reasons stated herein, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 92-16952
D.C.No. CV-90-01274-SMM

CLARENCE L. HEDGES, Debtor; PATRICIA HEDGES BECKETT, Personal Representative for Clarence Lee Hedges,
Appellant,
v,
RESOLUTION TRUST CORPORATION, as Receiver for Gibraltar Savings, F.A., Successor-in Interest to CATHEDRAL MORTGAGE COMPANY, INC., a California corporation,
Appellee,

NO. 93-15606
D.C. No. CV-90-01274-SMM

In re: CLARENCE L. HEDGES, Debtor/Deceased by PATRICIA HEDGES BECKETT, Personal Representative for CLARENCE LEE HEDGES

AFTON JANE IZEN
Appellant,
v.
RESOLUTION TRUST CORPORATION, as Receiver for Gibraltar Savings, F.A., Successor-in-Interest to CATHEDRAL MORTGAGE COMPANY, INC., a California corporation,
Appellees.

Appeal from the United States District Court
for the District of Arizona
Stephen M. McNamee, District Judge, Presiding

Argued and Submitted
February 11, 1994 - San Francisco, California

Filed July 14, 1994

Before: Betty B. Fletcher, Alex Kozinski and
Stephen S. Trott, Circuit Judges.

Per Curiam

SUMMARY

**Bankruptcy/Litigation and Procedure (Civil)/
Dischargeability of Debts**

The Court of appeals affirmed a district court judgment. The court held that the bankruptcy court did not err in determining that a party that filed a proof of claim in a bankruptcy proceeding could properly seek to evict the debtor and collect post-petition rents consistent with the permanent injunction accompanying the bankruptcy discharge.

Patricia Beckett executed a promissory note secured by a deed to residential property. Beckett defaulted, sometime after the original payee assigned the note to Cathedral Mortgage Corp., the predecessor in interest to appellee Resolution Trust Corp. (RTC). Beckett sought to convey a life interest in property to her father, Clarence Hedges. Shortly thereafter, Cathedral purchased the property at a trustee's sale.

Hedges filed for bankruptcy, and Cathedral filed a proof of claim seeking to establish ownership of the property and to get post-petition rent for Hedges' occupancy of it, along with costs and fees. The bankruptcy court ruled that Hedges was entitled to a discharge for his pre-petition debts.

Cathedral sought a determination from the bankruptcy court that 11 U.S.C. § 524(a)(2) did not prevent it from seeking to evict Hedges and to collect post-petition rent. The bankruptcy court ruled that § 524 did not prevent Cathedral from seeking to enforce its rights in state court. The bankruptcy court denied Hedges' motion for reconsideration.

The district court affirmed and sanctioned Hedges' counsel for fees and costs. Hedges appealed, and his counsel appealed the sanctions.

[1] The bankruptcy court did not err in determining under § 524 (a)(2) that Cathedral could properly seek to evict Hedges and collect post-petition rents consistent with the permanent injunction accompanying a bankruptcy discharge. Cathedral was not seeking to collect a pre-petition debt. The injunction did not prevent a state court from adjudicating the issues of the scope of the parties' property interests and the post-petition liabilities which flowed from them.

[2] The district court had authority to impose sanctions on counsel, and, though the amount it imposed was substantial, there was no abuse of discretion.

COUNSEL

Afton Jane Izen, Bellaire Texas, for the appellant.

Timothy L. Pierson and Timothy P. Stallcup, Perry, Pierson & Kolsrud, Phoenix, Arizona, for the appellees.

OPINION

PER CURIAM:

We decide certain issues arising under § 524(a)(2) of the Bankruptcy Code and also clarify the source of a district court's authority to impose sanctions on appeal from a bankruptcy court.

I

On August 19, 1985, Patricia Hedges Beckett ("Beckett") executed a promissory note for $96,000, secured by a deed to residential property ("the property"). Supp. ER, doc. 1, at ¶ 3. But Beckett defaulted, sometime after the original payee assigned the note to Cathedral Mortgage Corporation ("Cathedral"), *id.* at ¶¶ 5,7 – the predecessor in interest to appellee Resolution Trust Corporation ("RTC"). Then, through a series of conveyances, Beckett sought to convey a life interest in the property to her father, Clarence Lee Hedges ("Hedges" or "the debtor"). *Id.* at ¶¶ 8, 9-10. Shortly thereafter, Cathedral purchased the property at a trustee's sale, getting a deed that, it says, "vested all right, title and interest in the Property in Cathedral." *Id. at* ¶ 12.

Hedges filed for bankruptcy, and Cathedral filed a proof of claim seeking to establish ownership of the property and to get post-petition rent for Hedges' occupancy of it, along with costs and fees. *See* Supp. ER, doc. 1, at ¶ 2. Hedges never objected to this proof of claim. On August 25, 1989, the bankruptcy court ruled that Hedges was entitled to a discharge for his pre-petition debts. ER, doc. 8, at 1.

Six months later, Cathedral sought a determination from the bankruptcy court that 11 U.S.C. § 524(a)(2) did not prevent it from seeking to evict Hedges and to collect post-petition rent. ER, doc. 2 at 3. Hedges never responded. Though an Arizona

Superior Court had made Beckett temporary guardian for Hedges, she did not secure counsel for him, instead seeking to appear personally on his behalf. *Id.* At a hearing two months later, the bankruptcy court declined to let her do so, denied her motion for a continuance, and ruled that § 524 did not prevent Cathedral from seeking to enforce its right in state court. *Id.* at 3-4.

Five days after the hearing, Hedges, now represented by counsel Afton J. Izen, filed a Motion for Reconsideration which raised a series of objections to the bankruptcy court's ruling. *Id.* The bankruptcy court denied the motion. *Id.*

On appeal in district court, counsel sought three extensions, Sanctions ER, doc. 7, at item 4; *Id.* at item 15; *Id.* at item 24, and a stay pending appeal. The district court denied the stay unless Hedges posted a $10,000 bond. Sanctions Sup. ER, doc. 2, at 1. Hedges made two botched attempts at posting the bond, *see* Sanctions Sup. ER, doc. 4, at 1; *id.*, doc. 5, at 2, before finally getting it right. *Id.*, doc. 6.

Hedges then filed a series of unsuccessful motions, including one in bankruptcy court demanding that opposing counsel show authority to represent his client, Sanctions ER, doc. 6, at item 61 which was dismissed as "moot and frivolous," Sanctions Sup. ER, doc. 5, at 2 – and another in district court seeking to supplement the record on appeal with items not before the bankruptcy court, *id.*, doc. 7, at 1; *id.* at 4 (denying motion).

The district court affirmed the bankruptcy court and sanctioned Hedges' counsel for fees and costs, which totalled $24,207.09. Sanctions ER, doc. 2. Before us, Hedges renews the claims rejected by the district court, while his counsel appeals the sanctions.

II

Hedges urges us not to reach the merits of the bankruptcy court's § 524 determination. Rather, he says we should reverse outright because he had a constitutional right to counsel which the bankruptcy court violated by leaving him unrepresented at the § 524 hearing. But there is no absolute right to counsel in civil proceedings. *See Ivey v. Board of Regents*, 673 F.2d 266, 269 (9th Cir. 1982). Moreover, as his court-appointed temporary guardian, Beckett had the same powers as a permanent guardian, *see* Ariz. Rev. Stat. Ann. § 14-5310(I) (1993), and could thus have retained counsel for him, *see* Ariz. Rev. Stat. Ann. § 14-5312(A)(3) (1993), but declined to do so.

Nor must we reverse just because Cathedral never filed an adversary proceeding or complied with the time limits imposed by § 523 and Bankruptcy Rule 7001, as Hedges claims we should. Cathedral was not making a claim under § 523 – that is, it wasn't saying Hedges' debt was non-dischargeable. Rather, Cathedral made its claim under § 524, arguing that this provision's permanent injunction didn't apply to the actions it was attempting: evicting Hedges and collecting post-petition rents. To pursue these claims, Cathedral didn't have to comply with the procedural requirements of § 523.

[1] On the merits, the bankruptcy court did not err in determining under § 524(a)(2) that Cathedral could properly seek to evict Hedges and collect post-petition rents consistent with the permanent injunction accompanying a bankruptcy discharge. Cathedral was not seeking to collect a pre-petition debt, something that would not be permitted under § 524.[1] *See* 11

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[1]Section 524(a)(2) reads as follows:

A discharge in a case under this title...operates as an injunction against the commencement or continuation of an action, the employment of

U.S.C. § 524(a)(2). Rather, Cathedral was seeking first to evict Hedges from property it claims to have purchased in a trustee's sale. *See* Supp. ER, doc. 1. Second, Cathedral sought compensation for Hedges' post-petition use of the property – that is, post-petition rent. While Hedges disputes both these claims – by arguing that a life estate was reserved for him when the property was sold – this dispute is about the scope of the parties' property interests and the post-petition liabilities which flow from them, not about a pre-petition debt or avoided lien. Thus, the injunction does not prevent a state court from adjudicating these issues.

III

As to sanctions, we initially reject the argument that we are without jurisdiction to decide this question. In particular, we do not agree that the RTC had to exhaust administrative remedies under 12 U.S.C. § 1821 before coming to federal court. That is a prerequisite for an action *against* the RTC, *see Henderson v. Bank of New England*, 986 F.2d 319 (9th Cir. 1993), not one brought by it. Authority for the latter comes from 12 U.S.C. § 1821(d)(2)(B)(ii), which empowers the RTC to "collect all obligations and money due the institution" and says nothing about exhausting administrative remedies.

The more interesting issue is the source of the district court's authority to impose sanctions. We've already held that Rule 11 does not empower district courts to impose sanctions when they are serving in their capacity as bankruptcy reviewing courts. *In re Akros Installations, Inc.*, 834 F.2d 1526, 1531 (9th Cir. 1987).

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process, or an act, to collect, recover, or offset any [debt discharged under section 727, 944, 1141, 1228, or 1328 of this title] as a personal liability of the debtor, whether or not discharge of such debt is waived....

11 U.S.C. § 524(a)(2).

Moreover, while the district court could presumably impose sanctions under its inherent powers or under 28 U.S.C. § 1927, it would have to find recklessness or bad faith, *see id.* at 1532, which it did not here.

Nor could the district court rely on Fed. R. App. P. 38. On its face, this rule doesn't apply to proceedings before a district court. *See* Fed. R. App. P. 38 ("If a *court of appeals* shall determine that an appeal is frivolous, it may award just damages...") (emphasis added). A district court also cannot rely on the fact that the Bankruptcy Appellate Panel – the alternative forum for review of bankruptcy court orders – uses Rule 38. In concluding it could rely on Rule 38, the BAP pointed to Rule 13 of its own rules of procedure, which directs it to apply the Federal Rules of Appellate Procedure whenever the Bankruptcy Rules and BAP rules are silent. *See In re Burkhart,* 84 B.R. 658, 661 (BAP 1988). BAP Rule 13 does not apply in district court, nor is there an equivalent rule in the Federal Rules of Civil Procedure.

Rather, the proper authority is Bankruptcy Rule 9011 (which is essentially identical to Rule 11). While we've held that a prior version of Rule 9011 doesn't authorize district courts to impose sanctions in appeals from bankruptcy court, *Akros,* 834 F.2d at 1531, the Bankruptcy Rules have been amended. Specifically, they no longer define "court" as "bankruptcy court," a definition we considered dispositive in *Akros. See id.* Rather, "court" is now defined as "the judicial officer before whom a case or proceedings is pending." Bankr. R. 9001(4). This broader phrase clearly sweeps in district courts. *See In re Roete,* 936 F. 2d 963, 967 (7th Cir. 1991) ("From the plain language of the 1987 amendment, it is clear that Rule 9011 applies to the district court.")

[2] The district court, therefore, certainly had authority to impose sanctions on counsel and, though the amount it imposed was substantial, we find no abuse of discretion. As the district

court properly concluded, "The legal arguments raised in Debtor's briefs are wholly without merit. Furthermore, the record is replete with Debtor's counsel requesting numerous extensions and counsel's failure to follow the proper procedural rules unless ordered by this Court," ER, doc. 2, at 8.

However, we elect not to award sanctions on appeal. Given the amount of the sanctions, we do not fault counsel for trying to have the award reversed, nor was the effort frivolous.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Filed October 25, 1994
In the District Court of Arizona

NO. 92-16952
CT/AG#: CV-90-01274-SMM
CLARENCE L. HEDGES, Debtor; PATRICIA HEDGES BECKETT, Personal Representative for Clarence Lee Hedges,
Appellants,
v,
RESOLUTION TRUST CORPORATION, as Receiver for Gibraltar Savings, F.A., Successor-in Interest to CATHEDRAL MORTGAGE COMPANY, INC., a California corporation,
Appellee

NO. 93-15606
CT/AG#: CV-90-01274-SMM
In re: CLARENCE L. HEDGES, Debtor/Deceased by PATRICIA HEDGES BECKETT, Personal Representative for CLARENCE LEE HEDGES

AFTON JANE IZEN
Appellant
v.
RESOLUTION TRUST CORPORATION, as Receiver for Gibraltar Savings, F.A., Successor-in-Interest to CATHEDRAL MORTGAGE COMPANY, INC., a California corporation,
Appellees

MANDATE

APPEAL FROM the United States District Court for the District of Arizona (Phoenix).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona (Phoenix) and was duly submitted.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

A TRUE COPY ATTEST dated October 19, 1994, by Clerk of Court.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
Filed October 11, 1994
In the U.S. Court of Appeals, Cathy A. Catterson, Clerk
NO. 92-16952
D.C. No. CV-90-01274-SMM
CLARENCE L. HEDGES, Debtor; PATRICIA HEDGES BECKETT, Personal Representative for Clarence Lee Hedges,
Appellants,
v,
RESOLUTION TRUST CORPORATION, as Receiver for Gibraltar Savings, F.A., Successor-in Interest to CATHEDRAL MORTGAGE COMPANY, INC., a California corporation,
Appellee

NO. 93-15606
D.C. No. CV-90-01274-SMM
In re: CLARENCE L. HEDGES, Debtor/Deceased by PATRICIA HEDGES BECKETT, Personal Representative for CLARENCE LEE HEDGES

AFTON JANE IZEN
Appellant
v.
RESOLUTION TRUST CORPORATION, as Receiver for Gibraltar Savings, F.A., Successor-in-Interest to CATHEDRAL MORTGAGE COMPANY, INC., a California corporation, Appellees

Before: FLETCHER, KOZINSKI, and TROTT, Circuit Judges.

ORDER

The petition for rehearing is ordered filed and denied.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

N0. CIV-90-01274-PHX-SMM
BKC No. B-89-3713-PHX-RGM

In re: CLARENCE L. HEDGES, Debtor, Appellant.

CLARENCE L. HEDGES, Appellant,
v.
RESOLUTION TRUST CORPORATION, as Receiver for Gibraltar Savings, F.A., Successor-in Interest to CATHEDRAL MORTGAGE COMPANY, INC., a California corporation, Appellee

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JUDGMENT
Filed February 16, 1993

The United States District Court for the District of Arizona, having affirmed the decision of the Bankruptcy Court and denied Debtor/Appellant's claims on appeal by order dated September 28, 1992, and the Court having imposed sanctions against Debtor/Appellant's counsel in the amount of $24,207.09 by order dated December 1, 1992, and good cause appearing therefor:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

Afton Jane Izen, counsel for Clarence Lee Hedges, Debtor/Appellant (deceased), and for Patricia Hedges Beckett, personal representative for Clarence Lee Hedges, is hereby

ordered to pay to Appellee as a sanction attorneys' fees and costs in the amount of $24,207.09, as set forth in Appellee's "Verified Statement of Attorneys' Fees and Costs." Said amount has been determined and approved by the United States District Court for the District of Arizona.

DONE IN OPEN COURT February 12, 1993.

/s/ Stephen M. McNamee
Stephen M. McNamee
JUDGE OF THE U.S. DISTRICT COURT

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

N0. CIV-90-01274-PHX-SMM
BKC No. B-89-3713-PHX-RGM

In re: CLARENCE L. HEDGES, Debtor/ Appellant.

CLARENCE L. HEDGES, Appellant,
v.
CATHEDRAL MORTGAGE COMPANY, INC., a California corporation, Appellee

---

ORDER
Filed December 1, 1992

On September 28, 1992, this Court affirmed the decision of the Bankruptcy Court finding that the Debtor had no right to counsel in his bankruptcy proceeding and that 11 U.S.C. § 524 did not prevent Appellee from seeking to evict Debtor or collecting post petition rent owed by the Debtor. Pursuant to Rule 38, Federal Rules of Appellate Procedure, the Court also imposed sanctions against Debtor's counsel for filing a frivolous appeal.

Appellees's counsel has filed a "Verified Statement of Costs and Attorney's Fees," describing the fees and costs incurred in defending this appeal. The total amount requested is $24,207.09. Appellee's expended 158.10 hours of attorney time. Appellee had four attorney's assisting in this case. Depending on the attorney, the billing rates were either 180.00 per hour, 140.00 per hour or 125.00 per hour. Appellee also utilized a paralegal

working at a rate of $65.00 per hour.

After reviewing the time sheets, the Court finds $24, 207.09 a reasonable amount for the appeal. Appellee was required to respond to several unique motions filed by the Debtor as well as prepare a responsive appellate brief. During the course of this appeal, Appellee appeared before three courts, the Bankruptcy Court, the Bankruptcy Appellate Panel and this Court. In addition, the issues raised by Debtor were often difficult to understand and poorly drafted, requiring extra effort on the part of the Appellee. Given the uncommon nature of this appeal and the number of pleadings Appellee was expected to respond to, or file, the Court finds Appellee's charges and costs to be reasonable.

IT IS THEREFORE ORDERED that Pursuant to Rule 38, Federal Rule of Appellate Procedure, the Court imposes sanctions against Debtor's counsel in the amount of $24,207.09

DATED this 1st day of December, 1992.

/s/ Stephen M. McNamee
Stephen M. McNamee
United States District Judge

copies to all counsel and Bankruptcy Judge Robert G. Mooreman

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

N0. CIV-90-01274-PHX-SMM
BKC No. B-89-3713-PHX-RGM

In re: CLARENCE L. HEDGES, Debtor/ Appellant.

CLARENCE L. HEDGES, Appellant,
v.
CATHEDRAL MORTGAGE COMPANY, INC., a California corporation, Appellee

---

ORDER
Filed September 29, 1992

I. FACTS

Debtor/Appellant appeals the bankruptcy court's decision that the discharge injunction under 11 U.S.C. § 524 did not bar Appellee from evicting the Debtor from the property or seeking post-petition rent for the Debtor's use of the property.

The property in question originally was owned by the Debtor's daughter, Patricia Hedges Beckett. On August 19, 1985, Ms. Beckett executed a Promissory Note for $96,000 in favor of Stanco, Incorporated, and Arizona corporation. The Note was secured by a Deed of Trust dated August 19, 1985 and recorded on August 23, 1985. Ms. Beckett was named as Trustor, Newport Escrow Company was named as Trustee and Stanco as Beneficiary. Stanco assigned its rights to Cathedral on

August 19, 1985. This assignment also was recorded on August 23, 1985.

Ms. Beckett defaulted under the terms of the Note and Deed of Trust. In what appears to be an effort to avoid foreclosure, Ms. Beckett transferred her interest in the property by Warranty Deed to Kirk Beckett on June 3, 1988.

On June 29, 1988, the Trustee recorded a notice of Trustee's Sale of the property with the Maricopa County Recorder. On September 6, 1988, Kirk Beckett conveyed all of his interest in the Property to Nitro Land Trust Chapter I, a Nevada corporation. Also on September 6, 1988, pursuant to a Quit Claim Deed, Nitro purported to convey a life estate in the property to the Debtor.

On September 29, 1988, the Trustee, pursuant to A.R.S. § 33-810 and the terms of the Deed of Trust, sold the property to Cathedral. The Trustees' deed was recorded September 30, 1988 in Maricopa County, Arizona. The deed vested all right, title and interest in the property to Cathedral, subject to the lien of the first deed of trust in favor of H.S. Pickrell.

Before Debtor filed his bankruptcy petition, Cathedral brought an action for forcible detainer against Debtor in Maricopa County Superior Court, Arizona. On May 1, 1989, Debtor filed a Chapter 7 bankruptcy proceeding. On May 16, 1989, the state court entered judgment against the Debtor on Cathedral's forcible detainer. However, the state court stayed eviction of Debtor until his discharge in bankruptcy or until Cathedral moved for appropriate relief in the bankruptcy court.

In Debtor's May 1, 1989 Chapter 7 petition, he claims a life estate in the Property, but indicated that the life estate was disputed. On June 12, 1989 there was a creditor's meeting which Cathedral failed to attend. On June 14, 1989, Cathedral filed its

proof of Claim, alleging it was the legal and equitable owner of the property and that Debtor was liable to Cathedral for the fair market rental value of the property since September 29, 1988.

Debtor did not file an objection to Cathedral's proof of Claim. On August 25, 1989, the Debtor was discharged in bankruptcy.

On March 2, 1990, Cathedral filed a Motion for a Determination of the Inapplicability of 11 U.S.C. § 524 with respect to Cathedral's commencement of an eviction action against the Debtor and an action for post-petition rents. Debtor never filed a response. However, on March 14, 1990, Debtor's daughter filed a motion for appointment as representative for the Debtor. At this time the Debtor was 94-years old and in poor physical health. During the hearing on March 15, 1990, the Bankruptcy Court indicated that Ms. Beckett was not authorized to appear on behalf of her father and refused to recognize her as the Debtor's representative. The Court also denied Ms. Beckett's motion for appointment as representative of Debtor for lack of jurisdiction and advised her such relief only was available in state court.

On May 16, 1990, the bankruptcy court heard Cathedral's Motion for Determination of Inapplicability of 11 U.S.C. § 524 and the Debtor's Motion for Appointment as representative for the Debtor. By this time, Ms. Beckett had been appointed temporary guardian. However, she had not retained counsel and the Court refused to allow Ms. Beckett to appear on behalf of the Debtor. The Bankruptcy Court also denied Ms. Beckett's motion to continue the hearing on Cathedral's motion under 11 U.S.C.§ 524. Last, the Bankruptcy Court found that the § 524 injunction did not protect the property.

On January 25, 1991, Debtor passed away. His daughter, Ms. Beckett, was substituted in as the personal representative of Debtor's estate. This Court previously denied Cathedral's motion

to dismiss on the grounds of mootness. After the estate was substituted in as the party, the Court found Debtor still had a viable appeal, because Cathedral could claim post-petition rents from the estate.

Debtor raises three issues on appeal: 1) Debtor's right to counsel and due process was violated under the Fifth and Six Amendments because the Bankruptcy Court ruled without giving Debtor and adequate opportunity to have counsel; 2) the Creditor untimely filed its claim against Debtor; (3) the Bankruptcy Court improperly determined that Debtor was liable for a debt or rent on the Property.

II. STANDARD OF REVIEW

Pursuant to Bankruptcy Rule 8013, the district court reviews findings of law de novo and findings of fact shall not be set aside unless clearly erroneous. After reviewing the record before this court, the Court shall affirm the Bankruptcy Court's decision.

III. DISCUSSION

A. Debtor's Right to Counsel under the Fifth and Sixth Amendments

Debtor had no constitutional right to counsel in the bankruptcy proceeding. There is no constitutional right to counsel in a civil case. *See Ivey v. Board of Regents of University of Alaska*, 673 F. 2d 266, 269 (9th Cir. 1982); *Randall v. Wyrick*, 642 F.2d 304 (8th Cir. 1981). Thus, Debtor had no constitutional right to counsel under the Fifth or Sixth Amendments.

Debtor's argument that he was denied effective assistance of counsel also is without merit. Debtor contends that his temporary guardian, Ms. Beckett was without authority to retain

counsel. However, Arizona empowers a temporary guardian with the same authority and duties as a permanent guardian. A.R.S. § 14-5310 and 14-5312 (1975).

Consequently, the Court affirms the Bankruptcy Court's determination that the Debtor had adequate and amply opportunity to present his position and was not denied due process of law with respect to Cathedral's motion for determination of Inapplicability of 11 U.S.C. § 524.

B. Timeliness of Cathedral's Motion

On appeal, Debtor argues that Cathedral had to raise its motion in an adversary hearing. Section 523 and Bankruptcy Rule 7001 requires a creditor to file an adversary complaint if the creditor is seeking a determination that a debt is not dischargeable.

However, Cathedral was not claiming that the debt owed it was non-dischargeable under 11 U.S.C. § 523. Instead, Cathedral sought an order from the Bankruptcy Court holding that the permanent injunction under 11 U.S.C. § 524 did not apply to its state court action to evict Debtor or its claims for post-petition rents. Thus, Cathedral's motion did not fall within the parameter of § 523 and the time limits therein.

C. 11 U.S.C. Section 524

The Bankruptcy Court properly determined that §524 did not bar Cathedral from seeking to evict Debtor or from pursuing post-petition rent. 11 U.S.C. § 524 operates as an injunction against commencement of an action to collect on a discharge debt. The permanent injunction under § 524 does not protect a discharged debtor from liability on an unavoided valid lien. *In re McNeil*, 128 B.R. 603, 607 (Bkrtcy. E.D.Pa. 1991); *In re Hagemann*, 86 B.R. 125, 126 (Bkrtcy. N.D.Ohio. 1988).

Further, a debtor's post-petition debts are not subject to the discharge injunction of § 524. *In re Harrell*, 57 B.R. 88, 90 (Bkrtcy. D.S.C. 1985).

There is no evidence that Debtor avoided the lien Cathedral had on the property. Consequently, the Bankruptcy Court did not err in finding 11 U.S.C. § 524 inapplicable to Cathedral's state court action to evict or its claim for post-petition rent payments. Cathedral was not required to file an adversary proceeding.

Debtor also argues that the Bankruptcy Court made a determination on the type of interest the Debtor had in the property. This argument is unsupported by the record. In reaching its conclusion, the Bankruptcy Court merely decided that the permanent injunction under § 524 did not bar Cathedral's eviction action or collection of post-petition rents.

IV. SANCTIONS

Pursuant to Rule 38, Federal Rules of Appellate Procedure, Cathedral asks this Court to sanction Appellant for filing a frivolous appeal. Rule 38 is applicable to bankruptcy appeals to the district courts. *In re Haynes*, 97 B.R. 1007, 1012 (9th Cir. BAP 1989); *In re Burkhart*, 84 B.R. 658, 661 (9th Cir. BAP 1988).

"An appeal is frivolous if the result is obvious, or the arguments of error are wholly without merit." *Hewitt v. City of Stanton*, 798 F. 2d 1230, 1233 (9th Cir. 1986) (citing, *DeWitt v. Western Pacific Ry.*, 719 F.2d 1448,1451 (9th Cir. 1983). The court finds that the appeal is frivolous. However, the Court shall not sanction Debtor. Rather, Debtor's counsel shall bear personally the expense of the Rule 38 sanctions. The legal arguments raised in Debtor's briefs are wholly without merit. Furthermore, the record is replete with Debtor's counsel

requesting numerous extensions and counsel's failure to follow the proper procedural rules unless ordered by this Court.

In some instances a hearing is required if a "factual question coneeming (sic) the propriety of sanctions is raised." *Hill v. Norfolk and Western Ry.*, 814 F. 2d 1192, 1201 (7th Cir. 1987). However, where the "conduct that is sought to be sanctioned consists of making objectively groundless legal arguments in briefs filed in this [C]ourt, there are no issues that a hearing could illuminate." Id.

Consequently, Debtor's counsel shall be required to pay Cathedral's reasonable attorney's fees and costs in defending this appeal. Cathedral shall submit an affidavit detailing the fees and costs it incurred in this appeal by October 13, 1992.

CONCLUSION

The decision of the Bankruptcy Court is affirmed. Debtor had no right to counsel in the bankruptcy proceeding and that court properly found that 11 U.S.C. § 524 did not prevent Cathedral from seeking to evict Debtor or collect post-petition rents owed by Debtor.

Pursuant to Rule 38, Federal Rules of Appellate Procedure, the Court also shall impose sanctions against Debtor's counsel for filing a frivolous appeal. Debtor's counsel shall be required to pay Cathedral's reasonable attorney's fees and costs. Cathedral shall submit an affidavit describing the fees and costs incurred in this appeal by Tuesday, October 13, 1992.
DATED this 28th day of September, 1992.

/s/ Stephen M. McNamee
Stephen M. McNamee
United States District Judge

copies to all counsel and Bankruptcy Judge Robert G. Mooreman

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

N0. CIV-90-01274-PHX-SMM
BKC No. B-89-3713-PHX-RGM
In re: CLARENCE L. HEDGES, Debtor/ Appellant.

CLARENCE L. HEDGES, Appellant,
v.
CATHEDRAL MORTGAGE COMPANY, INC., a California corporation, Appellee

---

JUDGMENT IN A CIVIL CASE
Filed September 29, 1992

Decision by Court.

This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the decision of the Bankruptcy Court is affirmed; therefore Appellant take nothing, and the action is hereby dismissed.

APPENDIX H

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

N0. CIV-90-01274-PHX-SMM
BKC No. B-89-3713-PHX-RGM
In re: CLARENCE L. HEDGES, Debtor/ Appellant.

CLARENCE L. HEDGES, Appellant,
v.
CATHEDRAL MORTGAGE COMPANY, INC., a California corporation, Appellee

---

CIVIL MINUTES - GENERAL
Filed May 14, 1991

DOCKET ENTRY
No apearances.

CLERK'S MINUTES Judge Inits: SMM Crt Rptr: J. Moll The Motion to dismiss the appeal [23-1] is denied. The estate of the deceased debtor has been substituted as a party in interest; consequently, the issues on appeal are still viable, particularly those of due process and rent payments allegedly owed by the debtor.

IT IS THEREFORE ORDERED that:

1. Within in 10 days the parties shall notify the court if there has been any settlement or other disposition making the appeal moot;
2. The appellant's briefs must conform with Bankr. Rule 8010(a) (1)(D) & (E), 11 U.S.C.A. Bankr. Appellant shall have 20days to file a supplemental opening and reply brief in conformity with Rule 8010. The supplemental briefs shall differ from the original brief

filed only to the extent that appropriate references to the record are included in the statement of the case and the argument; appellant shall not alter the facts or the language of the brief in any other manner.

3. The appellant shall have 20 days to file its supplemental briefs and serve opposing counsel with copies.
4. This court defers a decision on attorney's fees until resolution of the appeal.

cc: All counsel

APPENDIX I

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

In Chapter 7 Proceedings
No. B-89-03713-PHX-RGM

In re CLARENCE LEE HEDGES, Debtor

ORDER
Filed on May 23, 1990

This matter is before the Court pursuant to the Debtor's motion for reconsideration of the Courts Minute Entry Order of May 16, 1990 stating that § 524 did not apply to Cathedral Mortgage Corporations's eviction action and the Debtor's requests for leave to respond to Cathedral's motion to determine the applicability of § 524. The Debtor states as its reason for the rehearing that they did not have an opportunity to respond to the Cathedral's motion.

Cathedral's motion was filed on March 2, 1990 and a hearing was held on March 15, 1990. At this hearing the Debtor's motion to continue was granted and the hearing was continued until May 16, 1990. Based on the pleadings and the record as a whole the Court finds and concludes that the Debtor has had ample time to respond to Cathedral's motion and has had his day in Court and that the attempt to raise constitutional issues now is without merit. See Minute Entry ruling of May 16, 1990, and Discharge on August 25, 1990, attached.

Accordingly,

IT IS ORDERED that the Debtor's motion for reconsideration

and motion to respond are denied.

DATED this 23rd day of May, 1990.

/s/ ROBERT G. MOOREMAN
ROBERT G. MOOREMAN
CHIEF U. S. BANKRUPTCY JUDGE

Copy of the foregoing mailed
this 23rd day of May, 1990,
to:

Afton J. Izen, Esq.
P.O. Box 56746
Houston, TX 77027
Attorney for Debtor

Mark D. Svejda, Esq.
Perry, Pierson & Kilsrud
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Phoenix, AZ 85012
Attorneys for Cathedral Mortgage Co.

Victoria C. Drummond
P.O. Box 42747
Phoenix, AZ 85080
Trustee

Honorable Morris Rozar
Maricopa County Superior Court Judge
101 West Jefferson
Phoenix AZ 85003

/s/ Deputy Clerk

ATTACHMENT (1)

IN THE UNITED STATES BANKRUPTCY COURT FOR
THE DISTRICT OF ARIZONA
MINUTES
Filed May 16, 1990

BANKRUPTCY JUDGE: Robert G. Mooreman
CLERK: Janet Smith
COURT REPORTER: Kelly Yetter
NO./ADV. NO.: 89-3713-PHX-RGM

NAME: CLARENCE L. HEDGES CH 7

SUBJECT OF HEARING: MOTION BY PATRICIA HEDGES BECKETT FOR APPOINTMENT AS REPRESENTATIVE FOR DEBTOR AND MOTION BY CATHEDRAL MORTGAGE FOR DETERMINATION OF INAPPLICABILITY OF 11 U.S.C. 524

DATE/TIME: MAY 16, 1990, 11:15 AM, HEARING ROOM 1

APPEARANCES:
Patricia Beckett, Appearing on Behalf of Debtor
Renee Gerstman, Atty Cathedral Mortgage

PROCEEDINGS:
Ms. Gerstman questioned if Ms. Beckett was the proper representative for Mr. Hedges. She further stated no response has been filed to the motion for inapplicabililty.

Ms. Beckett filed a certified copy granting her temporary guardianship and conservatorship. She advised she will be retaining an attorney, Afton Izen for her father. She further requested the Court continue the hearing on the inapplicability issue until next week.

Ms. Gerstman stated she did not receive notice of a hearing on the guardianship issue. She objected to a continuance of todays hearing and urged the Court to rule today.

COURT: IT IS ORDERED TAKING THIS MATTER UNDER ADVISEMENT.

3:00 PM UNDER ADVISEMENT RULING

THE COURT HAVING HAD UNDER ADVISEMENT THE PENDING MOTIONS AND AFTER DUE CONSIDERATION THEREOF IT IS ORDERED THAT CONCERNING THE MOTION FOR THE DAUGHTER TO REPRESENT THE DEBTOR, IT IS ORDERED THAT PATRICIA BECKETT APPEARS TO HAVE A CONFLICT AND SHOULD NOT REPRESENT THE DEBTOR BECAUSE OF HER PRESENT LITIGATION IN STATE COURT, HOWEVER SINCE THE STATE COURT HAS APPOINTED HER TEMPORARY GUARDIAN OR CONSERVATOR AND THE MOTION, PROVIDES COUNSEL OF RECORD APPEAR WITH REFERENCE TO ANY DISPUTES IS THEREFORE GRANTED. THE MOTION FOR A CONTINUANCE IS DENIED. CONCERNING THE MOTION OF CATHEDRAL REGARDING SECTION 524, AND ON THE STATE OF THE RECORD, THE COURT FINDS AND CONSLUDES THAT THE HOUSE ON WHY WORRY LANE IS NOT PROTECTED BY THE AUTOMATIC STAY FOR THE REASONS SET FORTH IN THE MOTION.

/S/ Robert G. Mooreman
Robert G. Mooreman
Chief U.S. Bankruptcy Judge

Copies of the foregoing mailed 5-17-90 to:
Renee Gerstman
Patricia Beckett, P.O. Box 47236, Phoenix, AZ 85068
Afton Izen
Judge Rozar
U.S. Trustee

ATTACHMENT (2)

IN UNITED STATES BANKRUPTCY COURT
District of Arizona

In Re:HEDGES, CLARENCE L.
701 W. WHY WORRY LANE
PHOENIX, AZ 85021
DSSAN: 403-52-5474
Case No. 89-03713-PHX-RGM
Date Filed May. 1, 1989
Chapter 7

DISCHARGE OF DEBTOR(S)
Filed on August 25, 1989

It appearing from the record that the above-named debtor is entitled to a discharge, IT IS ORDERED:

1. The Debtor is released from all personal liability for debts existing on the date of commencement of the case, or deemed to have existed on such date pursuant to Section 348 (d) of the Bankruptcy Code (Titl 11, United States Code).

2. Any existing judgment or any judgment which may be obtained in any court with respect to debts described in paragraph 1 is null and void as a determination of personal liability of the debtor, except:

a. Debts determined nondischargeable by the Bankruptcy Court pursuant to § 523 (a)(2), (4), and (6) of the Bankruptcy Code; and

b. Debts which are nondischargeable pursuant to § 523

(1),(3),(5),(7),(8), and (9) of the Bankruptcy Code.

3. This order does not affect any pending complaint to have a debt declared nondischargeable pursuant to § 523 (a)(2),(4), and (6) of the Bankruptcy Code, nor does it prohibit filing of a complaint under § 523 (a)(1),(3),(5),(7),(8), and (9) of the Bankruptcy Code.

4. All creditors are prohibited from attempting to collect any debt that has been discharged in this case.

5. By virtue of § 525 of the Bankruptcy Code, no government unit or private employer may terminate the employment of or discriminate with respect to employment against the debtor solely because relief was sought in the Bankruptcy Court.

/s/ Robert G. Mooreman
Robert G. Mooreman, Chief Bankruptcy Judge

7 COPIES MAILED TO ALL CREDITORS AND INTERESTED PARTIES ON FEBRUARY 28, 1990 BY: /s/ signature of Deputy Clerk ~ Deputy Clerk

Case No. 89-03713-PHX-RGM

Supreme Court, U.S.
FILED
MAR 31 1995

No. 94-1246

In the Supreme Court of the United States

OCTOBER TERM, 1994

CLARENCE L. HEDGES, THROUGH PATRICIA HEDGES BECKETT, HIS PERSONAL REPRESENTATIVE, ET AL., PETITIONERS

v.

RESOLUTION TRUST CORPORATION, AS RECEIVER FOR GIBRALTAR SAVINGS, F.A., ETC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESOLUTION TRUST CORPORATION IN OPPOSITION

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the bankruptcy court's refusal to grant an additional postponement after a two-month continuance because petitioner had not yet retained an attorney constituted a violation of due process requirements.

2. Whether the district court abused its discretion in imposing sanctions and calculating the amount of sanctions.

3. Whether the district court's imposition of sanctions for filing a frivolous legal appeal violated due process.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1246

CLARENCE L. HEDGES, THROUGH PATRICIA HEDGES BECKETT, HIS PERSONAL REPRESENTATIVE, ET AL., PETITIONERS

v.

RESOLUTION TRUST CORPORATION, AS RECEIVER FOR GIBRALTAR SAVINGS, F.A., ETC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESOLUTION TRUST CORPORATION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 32 F.3d 1360. The opinion of the district court (Pet. App. 17a-23a) and the orders of the bankruptcy court (Pet. App. 27a-30a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 14, 1994. A petition for rehearing was denied on October 11, 1994. Pet. App. 12a. The petition for a writ of certiorari was filed on January 9, 1995. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Patricia Hedges Beckett attempted to convey to her father, petitioner Clarence L. Hedges, a life interest in a residential property which she had already used as security for a promissory note held by respondent.[1] Pet. App. 4a. Beckett defaulted on the note and petitioner Hedges filed for bankruptcy. *Ibid.* The bankruptcy court ruled that petitioner Hedges was entitled to a discharge for his pre-petition debts. *Id.* at 31a-32a. Respondent then filed a motion seeking a declaration from the bankruptcy court that 11 U.S.C. 524 did not prevent respondent from attempting to collect, in pending state court proceedings, rents for Hedges' use of the property after his petition for bankruptcy. Pet. App. 4a.

At the initial hearing on respondent's motion, Beckett appeared and sought to represent petitioner Hedges. 3/15/90 Tr. 3.[2] The bankruptcy court denied the request, in part because Beckett was not an attorney and had no legal authority to speak on his behalf. *Id.* at 10; see 28 U.S.C. 1654. Nevertheless, the court postponed the hearing for two months at Beckett's request, in part to permit Beckett to petition the state court to have herself appointed petitioner Hedges' guardian. 3/15/90 Tr. 10-11; Pet.

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[1] Cathedral Mortgage Company, Inc., a wholly owned subsidiary of Gibraltar Savings, F.A., originally held the note. Respondent Resolution Trust Corporation is currently acting as receiver for Gibraltar Savings.

[2] Transcripts of the hearings before the bankruptcy court were part of the record below and have been lodged with the Clerk of the Court.

App. 27a. After the hearing, Beckett was appointed temporary guardian for petitioner Hedges by a state court, *id.* at 4a-5a, and as such could have retained counsel for Hedges, *id.* at 5a-6a. Beckett did not do so. *Ibid.*

At the second hearing before the bankruptcy court, Beckett again appeared without an attorney, seeking another continuance or, in the alternative, to represent petitioner Hedges herself. 5/16/90 Tr. 6, 8. Respondent noted that Beckett had had notice of the proceeding for two months and had failed to obtain an attorney or file a motion for another extension. *Id.* at 7-8. Furthermore, respondent argued that Beckett should not be permitted to act as petitioner Hedges' counsel because she was not an attorney and appeared to have a conflict of interest due to pending state court proceedings. *Id.* at 3-4, 8-9. The court refused to allow Beckett to appear on behalf of petitioner, denied her request for another continuance, and granted respondent's motion on the merits. Pet. App. 29a-30a. Five days after the hearing, petitioner Afton J. Izen appeared as counsel on behalf of petitioner Hedges by filing a motion for reconsideration, which the bankruptcy court denied. Pet. 4; Pet. App. 27a-28a.

2. Petitioner Hedges filed a timely notice of appeal to the district court on May 25, 1990. RTC Dist. Ct. Br. 10. On January 25, 1991, petitioner Hedges died and Beckett was later substituted in as the personal representative of his estate. Pet. App. 19a; Fed. R. Civ. P. 25(a). Respondent filed a motion to dismiss, arguing that petitioner Hedges' death mooted the appeal. Pet. App. 19a-20a. The district court denied the motion, finding petitioner's arguments contesting the bankruptcy court's order were not moot because

it was still possible for respondent to recover from the estate any post-petition rents owed. *Id.* at 20a. In a later decision on the merits, the district court affirmed the bankruptcy court's determination that the bankruptcy proceedings did not prohibit a state court determination of this issue. *Id.* at 21a-22a.

Acting on a request by respondent (RTC Dist. Ct. Br. 26-27), the district court also sanctioned petitioner Izen for fees and costs, finding that the appeal was "frivolous" and that the "legal arguments raised in [petitioner Izen's] briefs are wholly without merit" and "were often difficult to understand and poorly drafted, requiring extra effort on the part of [respondent]." Pet. App. 22a, 16a.[3] The court awarded respondent attorney's fees and costs as a sanction. *Id.* at 22a. Relying on respondent's verified statements and time sheets, it calculated the sanction at approximately $24,000. *Id.* at 15a-16a.

3. The court of appeals affirmed. Pet. App. 1a-9a. The court rejected the argument that the bankruptcy court violated petitioner Hedges' constitutional right to counsel by denying a second postponement because there is no absolute right to counsel in civil proceedings and because Beckett, as his guardian, could have retained counsel for him. *Id.* at 6a. The

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[3] The court also found that "the record is replete with [petitioner Izen's] requesting numerous extensions and [her] failure to follow the proper procedural rules unless ordered by this Court." Pet. App. 22a-23a. Specifically, petitioner Izen sought three extensions; made two "botched attempts at posting the bond [necessary for a stay pending appeal] * * * before finally getting it right"; filed an opening brief devoid of any reference to the record, resulting in the need to file a second brief; and filed a series of frivolous motions. *Id.* at 5a, 25a-26a.

court also rejected petitioner Izen's challenges to the court-ordered sanctions, holding that Bankruptcy Rule 9011 permitted a district court to award sanctions, and that the district court did not abuse its discretion in sanctioning petitioner Izen or in calculating the amount of sanctions. Pet. App. 8a-9a.

ARGUMENT

1. Petitioner Hedges claims (Pet. 6-7) that the bankruptcy court's failure to grant more time to obtain counsel violated due process. A party's right to be represented by his or her own counsel in civil proceedings is protected by the Due Process Clause. See *Goldberg* v. *Kelly*, 397 U.S. 254, 270 (1970); *Powell* v. *Alabama*, 287 U.S. 45, 69 (1932); *Texas Catastrophe Prop. Ins. Ass'n* v. *Morales*, 975 F.2d 1178, 1180-1181 (5th Cir. 1992), cert. denied, 113 S. Ct. 1815 (1993). "A necessary corollary is that a [party] must be given a reasonable opportunity to employ and consult with counsel." *Chandler* v. *Fretag*, 348 U.S. 3, 10 (1954); see *Gray* v. *New England Tel. & Tel. Co.*, 792 F.2d 251, 257 (1st Cir. 1986) (collecting cases).

Although in extreme circumstances the failure of a court to grant a party additional time to obtain counsel can violate due process standards, see, *e.g.*, *Chandler*, 348 U.S. at 10; *Anderson* v. *Sheppard*, 856 F.2d 741, 748-749 (6th Cir. 1988); *Rios-Berrios* v. *INS*, 776 F.2d 859, 862-863 (9th Cir. 1985); *Castaneda-Delgado* v. *INS*, 525 F.2d 1295, 1298 (7th Cir. 1975), this Court has cautioned that "broad discretion must be granted trial courts on matters of continuances; only an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay' violates the right to the assistance of counsel." *Morris* v. *Slappy*, 461 U.S. 1, 11-12 (1983); see *Ungar*

v. *Sarafite*, 376 U.S. 575, 589 (1964) ("it is not every denial of a request for more time that violates due process even if the party * * * is compelled to defend without counsel").

Several factors indicate that the bankruptcy court's decision not to grant a second extension in this case was not a violation of due process. First, it was petitioner Hedges who was the catalyst of the current litigation when he invoked the authority of the bankruptcy court by filing a pro se petition in August, 1989. Pet. 4; Pet. App. 31a. He should not be heard to complain that in May, 1990, he was unprepared for the prospect of litigation. Second, when respondent sought a declaration of its rights, the hearing date was postponed for two months in order to provide an opportunity for petitioner Hedges to be represented. Pet. App. 27a. During the two-month respite, Beckett was appointed petitioner Hedges' temporary guardian by a state court and could have retained counsel for him, but had not done so by the time of the hearing. *Id.* at 6a, 20a-21a.[4]

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[4] Although petitioner claims (Pet. 4) that Beckett could not retain counsel until she was appointed permanent guardian by the state court, this assertion is contradicted by the record. While Beckett did not become petitioner Hedges' permanent guardian until May 24, 1990 (Pet. 4), petitioner Izen, an attorney retained by Beckett (Pet. App. 29a), appeared as petitioner Hedges' attorney on the motion for reconsideration filed May 21, 1990 (Pet. 4). Indeed, at the May 16, 1990, hearing Beckett informed the court that she had "been assured by [a state court judge] that [she] could go ahead and appoint an attorney to represent [her] father in this matter" while only his temporary guardian. 5/16/90 Tr. 6. Moreover, to the extent that petitioner's challenge relies on a claim that the district court and court of appeals misinterpreted Arizona law, "[n]ormally, * * * [the Court] defer[s] to the construction of

Continuances of this length are usually constitutionally sufficient. See, *e.g.*, *Ghajar* v. *INS*, 652 F.2d 1347, 1348-1349 (9th Cir. 1981) (one-month continuance adequate); *United States* v. *9.19 Acres of Land*, 416 F.2d 1244, 1245 (6th Cir. 1969) (court should have granted continuance when defendant only had one week to obtain counsel; 14 to 30 days is considered adequate). Finally, five days after the second hearing, petitioner Hedges had not only obtained counsel, but counsel had become familiar enough with the case to file a motion for reconsideration, suggesting that petitioner Hedges' request for further delay may have been due to his own lack of diligence. Under these circumstances, the bankruptcy court's decision not to grant another continuance and to proceed to act on the merits was not an abuse of discretion and did not violate due process. As the bankruptcy court noted, "[petitioner Hedges] has had ample time to respond * * * and has had his day in Court." Pet. App. 27a.

2. Petitioner Izen argues (Pet. 8-10, 12) that the district court erred in imposing sanctions and in calculating the amount of sanctions. Federal Bankruptcy Rule 9011 provides that a court before which a bankruptcy case is proceeding shall impose an "appropriate sanction" on any person who signs and files a paper which "reasonable inquiry" would show is not "warranted by existing law or a good faith argument for the extension, modification, or reversal

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a state statute given it by the lower federal courts" and will decline to follow their view only if "there is 'plain' error." *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 499, 500 n.9 (1985).

of existing law."[5] Rule 9011, like the analogous Fed. R. Civ. P. 11, does not require a finding of bad faith; instead, a court must examine the document in question objectively, determining whether the filing was reasonable under the circumstances. See *Business Guides, Inc.* v. *Chromatic Communications Enters., Inc.*, 498 U.S. 533, 551 (1991) (Rule 11); *In re D.C. Sullivan Co.*, 843 F.2d 596, 598-599 (1st Cir. 1988) (collecting Rule 9011 cases).

The district court in this case found that petitioner Izen had filed a "frivolous" appeal because "[t]he legal arguments * * * [were] wholly without merit." Pet. App. 22a. Such a determination is reviewed for an abuse of discretion. See *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 405 (1990) (Rule 11); *In re Marino*, 37 F.3d 1354, 1358 (9th Cir. 1994) (Rule 9011); *In re Coones Ranch, Inc.*, 7 F.3d 740, 743 (8th Cir. 1993) (Rule 9011). Petitioner Izen suggests (Pet. 8-10) that an abuse of discretion occurred in this case because the district court had earlier denied respondent's motion to dismiss the appeal and described the appeal as involving "viable" issues. Pet. App. 25a. In context, however, it is clear that the district court's ruling denying dismissal was not a measure of the merits of petitioners' arguments.

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[5] While the district court relied upon Fed. R. App. P. 38 in imposing sanctions, the court of appeals found that, even though the district court was acting in an appellate capacity, it was not a "court of appeals" for purposes of Rule 38. Pet. App. 8a. However, the court of appeals held that the district court had equivalent sanctioning authority under Bankruptcy Rule 9011. *Ibid.*; accord *In re Roete*, 936 F.2d 963, 967 (7th Cir. 1991). The district court's error was harmless because filing frivolous appeals is prohibited under both provisions. Cf. *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 407 (1990).

Instead, the order merely indicated that the death of petitioner Hedges did not in and of itself make the appeal moot. Petitioner also makes general claims (Pet. 9-10, 12) that her appeal was not frivolous and that the sanction imposed was excessive. The district court, however, is in the optimal position to make such a determination, the court of appeals did not find that the district court had abused its discretion, and petitioner's fact-specific claims to the contrary do not warrant further review by this Court. See *Cooter & Gell*, 496 U.S. at 402-403.

3. Petitioner Izen also argues (Pet. 10-11, 13) that the district court's imposition of sanctions against her was unconstitutional. Contrary to petitioner Izen's claim (Pet. 10), neither the "American Rule" nor due process requires a finding of bad faith or recklessness before a sanction authorized by a statute or court rule may be imposed. See *Chambers* v. *NASCO*, 501 U.S. 32, 46-47 (1991); *Business Guides*, 498 U.S. at 553.

Similarly, petitioner Izen's claim (Pet. 10) that the district court's imposition of sanctions without an evidentiary hearing violated due process ignores the distinction between sanctions based on objectively unreasonable arguments and those based on bad faith.[6] When the basis for a sanction is a determination that the person acted with a culpable mental state, an evidentiary hearing is normally required in order to

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[6] Petitioner Izen seems to suggest (Pet. 12) that the district court sanctioned her for her motions practice and her failure to comply with court rules. While the court did refer to these events (Pet. App. 22a-23a), it explained that no hearing was necessary because the sanction was based on petitioner's "objectively groundless legal arguments in [the] briefs filed." *Id.* at 23a.

permit crucial credibility determinations. Cf. *Califano* v. *Yamasaki*, 442 U.S. 682, 696-697 (1979); *Goldberg*, 397 U.S. at 269. However, when the conduct to be sanctioned consists of making groundless legal arguments, the documents essentially speak for themselves and an evidentiary hearing is not necessary. Cf. *Yamasaki*, 442 U.S. at 696; *Mathews* v. *Eldridge*, 424 U.S. 319, 343-345 (1976); see, *e.g.*, *Childs* v. *State Farm Mut. Auto. Ins. Co.*, 29 F.3d 1018, 1026 (5th Cir. 1994); *A. Hirsh, Inc.* v. *United States*, 948 F.2d 1240, 1250 (Fed. Cir. 1991); *Dodd Ins. Servs., Inc.* v. *Royal Ins. Co. of Am.*, 935 F.2d 1152, 1160 (10th Cir. 1991). In this case, all that due process required was notice and an opportunity to have one's arguments considered, *Goldberg*, 397 U.S. at 267-268, and petitioner Izen does not allege that she did not have adequate notice or a sufficient opportunity to submit a written defense, nor does she describe any relevant evidence she would have presented that might have changed the outcome. Under these circumstances, an evidentiary hearing would have contributed nothing but further delay.

Finally, petitioner Izen makes conclusory claims that imposing sanctions against her violated the First (Pet. 13), Fifth (Pet. 13), Eighth (Pet. 11-12, 13), and Fourteenth (Pet. 10, 13) Amendments. While some of these claims were raised in petitioners' petition for panel rehearing, none of them were raised prior to that, and they thus are not properly before this Court. See *Hoover* v. *Ronwin*, 466 U.S. 558, 574 n.25 (1984).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
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ELLEN B. KULKA
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MARCH 1995